No. 37

FILED
APR 12 1901
JAMES H. MCKENNEY

Brf. of Dudley & Michener

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed April 12, 1901.

THE MCKINLEY CREEK MINING COMPANY ET. AL. *Appellants*,
vs.
THE ALASKA UNITED MINING COMPANY ET. AL.
No. 240.

Appeal from the District Court of the United States for the District of Alaska.

BRIEF FOR APPELLEES.

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BYRON S. ELLIOTT PRINTING CO.

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BRIEF FOR APPELLEES.

I.

The Pleadings.

The appellees sued the appellants to enjoin them from attempting to work the placer mines in controversy, and from interfering with the appellees

in their possession, use and development thereof, and to quiet the title and possession thereof in the appellees. Pp. 143–146.

Appellants answered in denial, pp. 146–148, and filed a cross-complaint alleging ownership by them, ouster of possession by appellees, and they prayed an injunction. Pp. 148–152.

The appellees replied denying the allegations of the answer and cross-complaint. Pp. 152–155.

Evidently this suit was brought under the Oregon Code, which is as follows:

Section 504 [500]. Any person in possession, by himself or his tenant, of real property, may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest.

The decisions of the courts applicable to this section are grouped in 1 Hill's Oregon Code. Pp. 458–460.

Such a suit can be brought only by one in possession.

Coolidge *vs.* Forward, 11 Or., 118.

A suit to ascertain and quiet title under this section extends to and includes all the grounds of controversy between the parties as to the title of the premises, and by the final decree therein all matters affecting such title are determined.

Starr *vs.* Stark, 1 Saw., 270.

It is enough if the claim is likely to create doubt and uncertainty in respect to the title of the true owner, or operate injuriously to his enjoyment of

or beneficial dominion over the property.

Murphy *vs.* Sears, 11 Or., 12.

A party has the right to be quieted in his title whenever any claim is made to real estate, the effect of which may be litigation or a loss to him of the property.

Horn *vs.* Jones, 28 Cal., 204.

In an action to quiet title to a mining claim, where the plaintiff claimed only a possessoary title in the public lands of the United States, it was held that such a claim or title was sufficient to enable him to maintain the action.

Pralus *vs.* Pacific, etc., Co. 35 Cal., 34.
Merced Mining Co. *vs.* Fremont, 7 Cal., 319.
Smith *vs.* Brannan, 13 Cal., 107.

It is not essential in an action under this section that the complaint should aver the plaintiff to be the owner in fee; it will be enough if it appear that the plaintiff claims an interest in the land, and that the defendant asserts an adverse claim.

Stoddard *vs.* Burge, 35 Cal., 394.
Rough *vs.* Simmons, 65 Cal., 227.
Pierce *vs.* Felter, 53 Cal., 18.

II.

Abstract of Transcript.

On p. 1, near the top, there is this sentence: "*Bill of Exceptions.*"

Then follows:

1. Stenographic report of the evidence, or what

purports to be such. Pp. 1–139.

2. Charge to Jury, 140–143, no file marks.

3. Bill of complaint, 143–146, filed June 6, 1899.

4. Answer, 146–152, filed June 22, 1899.

5. Reply, 152–155, filed June 22, 1899.

6. Exceptions to instructions given and refused by the court, 155–158, filed November 14, 1899.

7. Affidavit of value, 159, filed November 22, 1899.

8. Notice of appeal, 160, filed December 8, 1899.

9. Application for time in which to perfect appeal, 161, filed December 14, 1899.

10. Appeal bond, 161, 162, filed December 13, 1899.

11. Docket entries relating to trial of case, numbered 963, 163–166, no file or date marks.

12. Verdict of jury, 166, no file marks or date.

There is no conclusion to or signing of this pretended bill of exception. Therefore, it is not a bill of exceptions at all, and we submit that nothing in the Transcript of Record from page 1 to page 139 can be considered by the court, *except the pleadings*.

The next alleged bill of exceptions is on pp. 166–207. It begins as follows: "Bill of Exceptions," and was allowed and signed February 6, 1900, but there is no file mark thereon, though Hill's Oregon Code requires it to be filed. The statute is as follows:

> Section 233 [230]. The statement of the exception when settled and allowed, shall be signed by the judge and filed with the clerk, and thereafter it shall be deemed and taken to be a part of the record of the cause.

This paper contains:

1. Assignment of Errors, pp. 166–196; not signed; no file marks.

This assignment contains the complaint and summons in C. G. Lewis *et. al. vs.* William A. Chisholm *et. al.* No. 967, in the court below, pp. 168–170, relating to the same property, and also filed June 22, 1899.

(*a*) Also an answer in the case at bar, August 5, 1899, pp. 171, 172 alleging the pendency of the action above mentioned.

(*b*) Then follows the reply to the answer just named, pp. 172, 173, filed November 16, 1899.

(*c*) Next is the judgment or order dismissing case No. 967.

(*d*) Extracts from the testimony and assignments of error based on the ruling of the court, pp. 174–196; not signed; not filed.

2. Verdict of the jury. P. 196, filed November 14, 1899.

3. Motion for judgment, notwithstanding the verdict, p. 197, filed November 15, 1899, and order overruling the motion.

4. Motion for new trial, filed November 15, 1899, and order overruling it, filed November 21, 1899, pp. 198, 199.

5. Objections to judgment, filed November 22, 1899, pp. 199, 200.

6. Decree and judgment, filed November 25, 1899, pp. 201, 202.

7. Application for supersedeas bond, filed November 25, 1899, pp. 202, 203.

8. Overruling of objections and denial of application for supersedeas bond, p. 203.

9. Notice of settlement of bill of exceptions, p. 204.

10. Order shortening time of serving notice of settlement of bill, p. 205, filed January 18, 1900.

11. Motion for special findings which was overruled February 6, 1900. P. 205.

Objections to the Bill.

While this "bill of exceptions" lacks some of the ordinary features, and was not filed. We will treat it, for the sake of the argument, as a valid bill of exceptions as far as it goes, but will point out some of its principal defects, as follows:

1. The evidence is not in the bill; nor is it in the record, for it was *not filed.*

2. The instructions given are not in the bill; nor are they in the record, for they were not filed or incorporated in the alleged assignment of errors, or brought into the record in any manner.

3. The exceptions to the instructions given and refused are not in the bill.

4. The assignment of errors was not signed or filed, and so not properly in the bill.

If these objections are well taken, the judgment of the court below will have to be affirmed, for all the questions discussed in the brief for the appellants are based on the evidence and the instructions given and refused.

III.

The Evidence.

The summary of the appellee's evidence found in appellant's brief, and the various discussions of it

therein, are so inexact not to say biased, that we wish to offer a brief outline of the testimony, although we do not believe any of the evidence is in the record, for the reasons heretofore stated.

The testimony for the appellees is to be found, if it can be said to be in the record at all, on pages 1 to 46, and in rebuttal from page 132 to 137. The witnesses were Peter Hall, William A. Chisholm, James Hanson, Daniel Sutherland, and Al. Lowe. The testimony in rebuttal was in denial of certain alleged conversations testified to by the witnesses for the appellants, and it need not be considered in this connection.

In addition to the oral testimony for the appellees, was the following written evidence:

1. Exhibit A—Power of attorney from Hall *et. al.* to Cahoon, October 4, 1898. P. 3.
2. Exhibit B—Location notice of Hall. P. 4.
3. Exhibit C—Location notice of Chisholm. P. 24.

(*a*) Hall's testimony shows that he Hanson, Chisholm, Sutherland, Hawes, and Cahoon in October, 1898, were at Pleasant Camp above Porcupine, on the Dalton trail, on the other side of McKinley creek, just about the boundary line, and it was decided that Hanson, Sutherland, and Cahoon should go prospecting on the Porcupine river. Hall could not go, and so it was suggested that a power of attorney should be given Cahoon. The latter drew up the instrument and it was duly signed. It reads as follows:

"Know all men by these presents that Peter Hall, William Chisholm, William S. Hawes, of

Pleasant Camp, British Columbia; have made, constituted, and appointed, and by these presents do make, constitute, and appoint C. P. Cahoon, of Pleasant Camp, British Columbia, our true and lawful attorney, for us and in our names, place, and stead to locate a mining claim in the Territory of Alaska.

In testimony hereof we have hereunto set our hands and seal this 4th day of October, A. D. 1898.

PETER HALL. [Seal.]
WM. A. CHISHOLM. [Seal.]
WM. S. HAWES. [Seal.]

Signed, sealed, and delivered in the presence of—

DAN SUTHERLAND.
P. 3. J. HANSON.

The men went away, but in a few days Cahoon returned and said he had "staked" them on McKinley creek. Hall and his associates went to the claims October 19 or 20, 1898, and found a location notice there, of which the following is a copy:

"*Location Notice.*"

"Notice is hereby given that I, the undersigned, have this 6th day of October, 1898, located a placer mining claim 1,500 feet running with the creek and 300 feet on each side from center of creek known as McKinley creek, in Porcupine mining district, running into Porcupine river. This claim is the east extension of W. A. Chisholm claim on about 1,800 feet from the first falls above the Porcupine river, in the district of Alaska.

PETER HALL, *Locator.*

Witness:
J. HANSON.
D. SUTHERLAND. P. 4.

Hall had the notice recorded as follows:

(Endorsed:) Peter Hall location, McKinley Cr. District of Alaska, Juneau, *ss:* The within instrument was filed for record at 2.15 o'clock p. m., Nov. 21, 1898, and duly recorded in Book 6, Placers, on page 107, of the records of said district. Norman E. Malcolm, district recorder. P. 4.

The Hall notice was put on one side of a stake and on the other side was Chisholm's notice, in his own handwriting. P. 5.

That notice was as follows:

"*Location Notice.*"

"Notice is hereby given that I, the undersigned, have, this sixth day of Oct., 1898, located a placer mining claim 1,500 ft. along creek bottom and 300 ft. from center of creek each way on creek known as McKinley, in Porcupine mining district, described as follows: West extension of Peter Hall's claim and about 300 feet above first falls on said creek, in the district of Alaska.

WM. A. CHISHOLM, *Locator.*

Witnesses:

D. SUTHERLAND.

JAMES HANSON."

And it was duly recorded. P. 24.

The winter season came on and work was shut down. About the first of May following Hanson, Chisholm, and Hall went back to the claims. On p. 5 Hall testifies as follows:

Q. What did you do?

A. We cut trails from Porcupine and cut trails up the creek to make it possible to get provisions up. The trail was along three or four claims, and done

considerable work to make it possible to get in provisions.

Q. What else did you do?

A. We built a flume about 2,000 feet long to get water to work the mine, and we worked the mine most of the summer and done considerable work all over.

Q. In opening it up?

A. Yes, sir.

And on p. 6 Hall testifies:

Q. That claim, as I understand, is in the Porcupine mining district, district of Alaska.

A. Yes, sir; it is.

Q. Now, after the location of these claims state if all these gentlemen agreed to work these claims together as a partnership and own them as such.

A. We did.

Q. And you own them as such now?

A. We do.

On cross-examination, he testifies, p. 21, that when he went to the claims about Oct. 20 he "designated an upper stake," "set a kind of notice there," "a duplicate of this notice as near as possible," signed and dated it.

(*b*) Chisholm's testimony, pages 22 to 31, corroborates Hall. Cahoon wrote the power of attorney, and then Chisholm and Hall grub-staked the prospecting party, consisting of Cahoon, Sutherland and Hanson, and they started into the Porcupine mining district. On the 8th of October they returned very much pleased, exhibiting some nuggets of gold, and Cahoon said he had staked all the boys, and to show that he had been impartial he staked

Chisholm first, Hall next, Hawes next, and so on up the creek. His actions in the premises were approved by his principals. The next day Chisholm, Hanson, Cahoon and others started up the Porcupine, and on the 19th of October Chisholm, Hall, Hanson, Sutherland and Jack Dalton reached the claims. They found the Chisholm location notice heretofore copied in this brief and had it recorded. Trans., p. 24.

In the spring of the following year they did considerable development work on the claims. They cut a long trail in order to get lumber and provisions up, building a flume 2,000 feet long and using 6,000 feet of lumber. Since that time they have continued to work the claim and were working it at the time of the trial.

On cross-examination, he says that his location notice was posted on an old snag and it was written on the wood with an indelible pencil. Page 29.

(c) Hanson's testimony, 31 to 40, is to the same effect. He says that Chisholm and Hall grub-staked Cahoon, Sutherland and himself, and they were to stake out claims for them. They went to the Porcupine, as directed, and the witness saw Cahoon stake a claim for Chisholm first and Hall next on the 6th day of October. A Mr. Hackley was present at that time. This man made a great deal of trouble afterwards, and it is important to note the testimony of his presence at the time of the staking of the claims. The witness says that Hackley made no objection nor did anyone else object to what was done. The party remained there two days and then went back to Pleasant Camp, where they found

Chisholm, Hall and Hawes. This witness returned to the Porcupine with Dalton, Chisholm, Hall and Hawes about the 19th or 20th of October, and they went to where the notice of location was.

On cross-examination, he said, among other things, that Hackley joined himself, Cahoon and Sutherland, and went with them to the Porcupine, and that Hackley was within 100 feet of Cahoon when the latter posted the location notice on the snag. They were all prospecting, working, panning out, digging and looking after gold. Page 35. The witness says, on the same page, that Hackley found gold there and called for the others to come and see it, Sutherland being the first one to see it.

Q. Were you with them all the time?

A. No. Mr. Sutherland and Mr. Cahoon came down into the creek about ten minutes before Mr. Hackley.

Q. Which one discovered gold?

A. Mr. Sutherland.

Q. What did he say when he found it?

A. I don't know what he said.

Q. Did he say anything to you and Cahoon?

A. Yes, sir.

Q. What did he say?

A. He said he found colors.

Q. When did Hackley tell you he found colors?

A. He was down in the creek, and he ran onto a crevice.

Q. According to your idea, Sutherland first found colors, and Hackley found it next, and within 100 feet of where this sign was put up?

A. Yes, sir; less than 100 feet.

Q. It would be on one of the claims in controversy?

A. Yes, sir.

Q. Which one?

A. Mr. Hall's.

Q. That on the claim which McConaghy is claiming now?

A. Yes, sir.

Q. So Mr. Hackley found gold on the claim in controversy?

A. Yes; that was where Mr. Sutherland first found the colors.

Q. Sutherland found colors below the claim in dispute between Hall and McConaghy, and also found some on the other claim in controversy?

A. Yes, sir.

Q. Isn't it a fact that Hackley found some pretty nice little nuggets and hollowed for you people to come and see them?

A. Yes, sir.

Q. Whose claim was that on?

A. Mr. Hall's.

Q. That is the one claimed in this case to be McConaghy's?

A. Yes, sir.

Q. You say that Sutherland found colors on the other claim. Did you see Hackley find anything on that claim while you were up there?

A. No, sir.

Q. You were with him all the time?

A. Yes, sir. (P. 36).

On p. 37 the witness was asked:

Q. Didn't you stake out a claim?

A. Yes, sir.

Q. Sutherland, did he stake out one?

A. Yes, sir.

Q. And one staked out for Hawes?

A. Yes, sir.

Q. Did Hackley stake out one?

A. No, sir.

Q. Was that all the staking that was done?

A. Mr. Cahoon staked out one for himself.

Q. You don't mean the whole time of this staking you parties were together up there, do you, Hanson?

A. Yes, sir; just about all.

Q. You would all go and stake one claim, and then all go and stake another claim?

A. Yes, sir; all within 150 feet.

(*d*) The testimony of Sutherland, pages 40 to 46, corroborates Hanson. He says they were outfitted by Chisholm and Hall, and they reached the Porcupine about the 4th of October, 1898, camped there that night, and on the morning of the 5th they started up the creek; but before they got to the mouth of McKinley Creek they met Hackley and other parties, who turned back and went up McKinley Creek with them.

Q. What did you do when you got up McKinley creek?

A. I was the first to get into the creek. I did a little panning and found there was gold there before the rest of the boys got there.

Q. Explain what kind of a place this was to get into there.

A. It is a kind of a box canyon.

Q. A difficult place to get in?

A. Yes, sir.

Q. Well, you say you discovered the first gold there yourself?

A. Yes, sir.

Q. About where was that? About what claim at the present time?

A. On the claim called the Chisholm claim.

Q. What, if anything, in the way of locations did you see Cahoon make there?

A. He didn't locate that day.

Q. What day did he?

A. On the 6th.

Q. State to the jury what locations were made on the 6th.

A. We stopped at a certain point where there was a snag stuck up amongst the rocks, and Cahoon said he believed he would locate the boys here as we go up, and I said all right; and he located Chisholm on the lower side and Hall on the upper side.

Q. Who was present at that time?

A. Hackley, Hanson, and I.

Q. How long did you remain on the creek?

A. That day until about noon on the next day.

Q. Who was staked next above?

A. Hawes.

Q. Is Hawes now one of the McKinley creek party?

A. Yes, sir.

Q. Was he along?

A. No, sir.

Q. Who staked for him?

A. Cahoon. P. 41.

On the next page he testifies that when they returned to Pleasant Camp, Cahoon told Chisholm and Hall that he had staked for them. The witness returned to the claim with Chisholm and Hall about the 19th or 20th of October, and again in May of the following year. Asked to state what work, if any, they had been doing there. He said:

> "We were working on the claims pretty much all summer, cutting trails and building a camp and building a flume to carry water 2,000 feet and working on the claims."

On page 43 the witness says that he was the first to discover gold on McKinley creek, and that he saw Hackley discover gold.

The evidence for the appellants is to be found on pages 46 to 131 of the transcript. Some of the witnesses testify that Hackley was the first discoverer of gold on the McKinley creek on the claims in controversy; some of them testify to the posting of the location notices, and then to the posting of other location notices covering the same property by other persons a few days afterward. In other words, some of these witnesses testify to the jumping of these claims, and to the usual occurrences in a lawless community struggling for valuable mining claims. All the witnesses who testify on the point agree that Hackley was one of the party which explored McKinley creek, and that he with others of that party did discover gold there. All the evidence shows that the country was extremely rough and difficult to explore. These claims were found in a wild region, and so new to the mining world that the few

men in it held a miners' meeting and elected a recorder to make record of their location notices, a thing which is only done where conditions are most primitive, but it is a custom which is sanctioned by the law. Section 2324, Revised Statutes.

IV.

The Power of Attorney.

Appellant's counsel assail the power of attorney on the theory that it granted power to Cahoon to locate a joint claim only. The language is "for us and in our names, place and stead, to locate a mining claim in the Territory of Alaska." Page 3. It would be a very narrow interpretation which would read this grant of power as a joint grant and one denying to the attorney in fact the power to locate a claim for each of the principals. This instrument, according to the evidence, was drawn at Pleasant Camp, in the wilderness, away from lawyers and those accustomed to the interpretation of language. The men who signed it were "grub-staking" and "outfitting" Cahoon and his companions, and it does not stand to reason that these three men would "grub-stake" and "outfit" three other men for prospecting with the understanding that the three principals should *jointly* have *one mining claim* as the result of their expenditure and risk. Cahoon and his companions did not so understand it, for, within less than four days of its execution, they located a claim for each of the three principals; the latter did not so understand it, for, when Cahoon re-

ported what he had done, they ratified his acts in the premises.

The natural and ordinary interpretation of the instrument, situated as were all the parties to it, was that *each of the principals* should obtain a mining claim by Cahoon's location as his representative.

In view of the verdict of the jury, it cannot be said that the practical interpretation which the parties put upon this instrument worked any damage to the appellants in this case. The verdict of the jury was based upon an entirely different theory of the case.

V.

The Location Notices.

The Hall notice is on page 4, and the Chisholm notice on page 24, of the transcript. Appellant's counsel assail these notices upon the theory that they are indefinite. If we were to depend upon appellants' brief, we might feel that these notices were quite indefinite, but when we come to read them exactly as they were written, posted and recorded, we find them definite and exact. Hall's notice locates "a placer mining claim 1,500 feet running with the creek and 300 feet on each side from center of creek known as McKinley Creek, in Porcupine Mining District, running into Porcupine river. This claim is the east extension of W. A. Chisholm's claim on about 1,800 feet from the first falls above the Porcupine river, in the District of Alaska."

The general location of the claim is clearly stated. It is the east extension of Chisholm's claim, about 1,800

feet from the first falls above the Porcupine river. There it begins and then it runs 1,500 feet with the creek and 300 feet on each side from center of creek. Placer mines are not often laid on precipices and never on mountain crags. They are naturally made to follow the windings of streams, gorges or canyons, for long experience has shown that the precious metals seek such hiding places. This claim for a distance of 1,500 feet, winds up the narrow valley of McKinley creek, 300 feet in width on each side of the center of that stream. An intelligent boy with a shoestring two feet in length could find this claim and locate its boundaries.

Chisholm's notice is equally definite. P. 24. His claim is the west extension of Peter Hall's claim about 300 feet above the first falls on McKinley creek. Beginning at this point 300 feet above the falls, he locates "a placer mining claim 1,500 feet along creek bottom, and 300 feet from center of creek each way, on creek known as McKinley, in Porcupine Mining District."

Thus we have Chisholm's claim, beginning 300 feet above the falls and going 1500 feet up the creek, where it finds Hall's claim, which runs 1500 feet further up the creek. These two claims stand end to end and extend 300 feet on each side of the center of the creek. In the absence of surveyors, platters, draftsmen and map-makers, we do not see how a more definite and exact description could have been given, and we venture the assertion that these location notices are as perfect in their way as such notices have been in the other mining camps and regions of this country.

VI.

"No Marking on the Ground."

Counsel for appellants, under the above heading, insist that the posting of notices on the snag standing on the line of these two claims did not comply with Section 2324 R. S., which provides that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced." Counsel for appellants, on pages 8 to 14 inclusive of their brief, quote from numerous cases on the general subject of marking on the ground. We hazzard the suggestion that a study of the cases cited will show that the controversy arose from overlapping boundaries of different claims and not where, as in the case at bar, two different parties were litigating about the same tract or claim.

In the case before the court the appellants and the appellees are litigating about the title, possession, and profits of two mining claims. Each side claims to have the exclusive title and right to possession and profits. Locators Hall and Chisholm, and those associated with them, have been in possession under a claim of title and have been enjoying the profits of the claims. Hackley, and those associated with him, the appellants in this case, put up their location notices, and ever since then have been trying to get possession of this property.

On pages 46 to 77 Cahoon testifies, and in his testimony he makes use of a plat. On page 49, while still using the plat, the following occurred:

"Q. What are the two claims marked closest to the mouth of the creek? What two claims are those?

"A. Hackley and McConaghy.

"Q. Are those the two claims in controversy in this case?

"A. Yes, sir."

On the next page Cahoon further identifies the Hackley and McConaghy claims as the Hall and Chisholm claims which Cahoon located for them. His testimony makes it clear that he was in collusion with Hackley at that time, although he was acting as the duly accredited agent of Hall and Chisholm. There can be no doubt that on that day began the conspiracy between Cahoon and Hackley to take these two claims away from the principals who had reposed their confidence in Cahoon. Indeed, on page 50, Cahoon says that he told Hackley that, so far as he was concerned, there would be no difficulty about his getting the claim. They were conspirators against the "grub-stakers" and "outfitters" of Cahoon, and since then they have been endeavoring to make the conspiracy effective.

Counsel for Hackley and McConaghy in the case at bar have found so much fault with the location notices of Hall and Chisholm that we may be pardoned for asking the attention of the Court to the Hackley and McConaghy location notices. Hackley's notice is on page 81, and it reads as follows:

"*Notice of Location.*"

"Notice is hereby given that I locate and claim, under the United States mining laws, one

mining claim on creek known as McKinley creek, 1,500 ft. from this notice up creek and 300 feet on each side of center of creek bed, in the Porcupine mining district, district of Alaska.

"Oct. 8th, 1898.

E. HACKLEY, *Locator.*

Witnesses:
C. G. LEWIS.
ALEX. MCCONAGHY."

The McConaghy notice is on page 131, and is an exact copy of the Hackley notice, with one less witness.

If the Hall and Chisholm notices are insufficient, it certainly follows that the Hackley and McConaghy notices are insufficient also.

Hackley testifies on page 80 that, on the 8th of October, he took two stakes, put them in the ground, and put the notices on them, one stake on the dividing line between claims 2 and 3 and the other stake on the dividing line between claims 1 and 2, indicating the claims on the plat, they being the claims in controversy here. On page 81 Hackley testifies that his location notice was 150 feet below the place where Cahoon had put a notice on the snag. Hackley's testimony is corroborated on this point by C. G. Lewis, pages 131 and 132.

If "the marking on the ground" was insufficient as done in the location of the Hall and Chisholm claims, the same must be held of "the marking on the ground" in the location of the Hackley and McConaghy claims.

Counsel for appellants does not make an exact quotation of the opinion of Judge Sawyer in the

case of Jupiter Mining Company *vs.* Bodie Consolidated Mining Company, 11 Fed. Rep., 666–677, where that learned Judge said:

> "The next point to which I shall call your attention, gentlemen of the jury, is the location. To make a valid location under the statute it is required that the '*location* must be distinctly marked on the ground so that *its boundaries can be readily traced*,' but the law does not define or prescribe what kind of marks shall be made or upon what part of the ground or claim they shall be placed.
>
> "Any marking on the ground, claimed by stakes and mounds, and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient. But there must be some such marking, and when a mining claim is once sufficiently marked out upon the ground and all other necessary acts of location are performed, it vests the right of possession in the locator, which right cannot be divested by the obliteration of the marks or removal of the stakes without the fault of the locator so long as he continues to perform the necessary work upon the ground and to comply with the law in other respects."

The learned judge then instructed the jury that if they believed from the evidence that the claim was actually and distinctly marked on the ground by stakes, notices, monuments, and work, so that its boundaries could be readily traced, and a vein containing gold or silver had been discovered there, and sufficient work was done to comply with the laws of Congress, then the location was valid.

In the case at bar it is clear that the jury believed that the claim had been distinctly marked on the ground by stakes, notices, and work, that precious metals had been discovered there, and that sufficient work had been done thereon to comply with the laws of Congress, and therefore the jury found a verdict for the appellees.

In North Noonday Mining Company *vs.* Orient Mining Company, 1 Fed. Rep., 522–532, 533, Judge Sawyer charged the jury as follows:

> "The next point to which I call your attention, gentlemen of the jury, is the location. To make a valid location, under the statute, it is required that 'the *location* must be distinctly marked on the ground, so that *its boundaries can be readily traced;*' but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed, by stakes and mounds and written notices, whereby the *boundaries* of the claim located *can be readily traced*, is sufficient.
>
> "If the center line of a location of a lode claim lengthwise along the lode be marked by a prominent stake or monument at each end thereof, upon one or both of which is placed a written notice showing that the locator claims the length of said line upon the lode from stake to stake, and a certain specified number of feet in width on each side of said line, such location of the claim is so marked that the boundaries may be readily traced; and, so far as the marking of the location is concerned, is a sufficient compliance with the law."

All this was done by the appellees' in the case at

bar, and we submit that their location notices and the "markings on the ground" were in all things sufficient.

But we are not without further authority on the subject of notices.

In Haws *vs.* Victoria Copper Mining Company, 160, U. S., Dyer located two mining claims by writing on a tree standing at or in close proximity to the place or places of discovery of said vein or lode, the two notices of location, one for each of the claims, and the notices which described the respective claims by reference to the tree. The notices also respectively described the boundaries of each claim by courses and distances from the tree. Each notice contained the name of the locator and date of location. The court below found that the tree was a sufficient natural object by which the claims could be identified.

Concerning the sufficiency of Dyer's notices, this court on page 318 said:

> "Moreover, the acts of Dyer, enumerated in the fourth finding, constituted a sufficient location by him of the two claims as against subsequent locators, irrespective of the posting of notices."

VII.

The Discovery of Mineral.

The evidence heretofore cited and quoted shows that four men, Hackley and Sutherland among them, explored McKinley Creek in October, 1898. They were exploring this region in company. Suth-

erland testifies that he was the first to make the discovery of gold, and in this he was corroborated by other witnesses. Hackley testifies that he made the first discovery of gold.

We submit that it does not matter which of these men made the first discovery in point of minutes; the central fact is that gold was discovered by these men who were hunting for it in company with each other, each having his own ends to accomplish, and that when the gold was discovered notices were posted immediately and claims were located for Hall and Ghisholm. The first to take advantage of the discoveries were Hall and Ghisholm. Hackley concluded a day or two afterwards to endeavor to take these claims for himself and McConaghy, and that determination of his was the origin of the present litigation. The court instructed the jury on the subject of discovery, and it is evident that the jury believed the testimony of the witnesses for the appellees on that point and returned their verdict accordingly.

We will add, also, that if Hackley were the original discoverer he could not, as the court below very properly instructed the jury, hold the district in his hand while he went on making other explorations for the purpose of deciding in his own mind which were the richer claims. If he made a discovery on a claim and went on looking for richer fields, he cannot be heard to complain because another man present at or participating in the discovery posted location notices and took the steps required by the law.

VIII.

"Location by Alien Void."

Counsel for appellants, under the above heading, find a great deal of fault with the instruction of the court to the effect that the question of citizenship was one which could be raised by the United States only, and that one man against another cannot question the citizenship of either.

The instructions given and asked upon this subject were upon the theory that the question of citizenship was involved. We do not know whether there was any evidence on the subject or not; the stenographer's notes, which occupy a large part of the transcript, do not begin with the first questions asked the witnesses, but each witness was asked about his residence, and each answered that he resided in Alaska. We submit that a residence in Alaska, in the absence of positive testimony to the contrary, must be held to imply citizenship in the United States. If a witness were asked his residence, and he answered that he resided in Ohio, the inference would follow that he was a citizen of the United States unless there were satisfactory and direct evidence to the contrary. Therefore we submit that there is no evidence in the record that the appellees were aliens.

Next, we submit that the question of alienage is not one which could be litigated in this suit in equity to secure to the complainants peaceable occupancy and quieting of title. A question of that kind could be raised in a proceeding in the General Land Office on an application for patent or by suit

on mineral adverse claim. If the appellees apply for a patent then the appellants under the law will have sixty days in which to file an adverse claim in the local land office and thirty days thereafter in which to file a suit in court upon the adverse claim so made to test the validity of any and all of the proceedings from the discovery of the minerals on until the end. Sec. 2326, Rev. Stat. This was the proceeding in Manuel vs. Wulff, 152 U. S., 505, 511.

In an adverse claim which may be filed by the appellants in a local land office they can raise the question of the alienage of the applicants for a patent. When the appellants bring their suits in the courts predicated upon their action in the local land office they can allege the alienage of the appellees. In the proceedings in the General Land Office and in suits in the United States courts the Government is not a party of record, but its officers obey the judgment of that court and execute the patent to the party who may be decreed entitled to it. The judgment roll is sent to the Commissioner of the General Land Office, and the patent is issued pursuant thereto. Sec. 2326, Rev. Stat.

The case of Manuel vs. Wulff, 152 U. S., 505–511, is in point here. It is held there "that if there had been no adverse claim in the Land Office Moses Manuel's application, which appears, in respect to this question, to have been made in good faith, would not have been rejected on the mere ground of alienage when he made it."

The opinion in that case is based upon the theory that a location made by an alien is not void but voidable, and the defect may be cured by the sub-

sequent naturalization of the locator.

In *McEvoy* vs. *Megginson*, 29 Land Dec., 164, Hanley, an alien, made a mining location. Application was made for a patent, but a protest was filed in which it was alleged that Hanley was not a citizen of the United States when he located the claim. It was held by the assistant secretary that Hanley's location was not void but voidable, and his declaration of intention to become a citizen of the United States related back to the date of his location and operated to validate it.

Thus we have another method furnished for testing the alienage question and we also have another ruling that a location made by an alien is voidable only. These rulings are in harmony with other well-considered cases. *Crœsus Mining Company* vs. *Colorado Land and Mineral Company*, 19 Fed. Rep., 78; *Lone Jack Mining Company* vs. *Meggison*, 82 Fed. Rep., 89.

No doubt the Government could maintain a suit in equity to set aside a patent issued to an alien.

View the question from whatever standpoint you will it is clear that the Government must participate in denying to an alien the fruits of any location or application he may make under our mining laws, and that until the Government does exercise its prerogative the location or application of the alien is voidable only.

We submit that the court below did not err in its instruction to the jury.

IX.

Intruder's Have No Rights.

In Haws *vs.* Victoria Mining Company, 160, U. S., 303, Dyer had discovered two mining claims and he had posted notices which were not recorded because there was no mining district recorder in that region, and he had also done some marking on the ground. Subsequently he and his grantee worked the mine. Haws and another employee conceived the idea that the proceedings of Dyer and his grantee were insufficient in law and determined to jump the claims. Accordingly, they posted notices of their own, and took possession of the claims with force. Suit in ejectment and for an injunction was brought, and this court, on page 316, said:

> "The facts on this subject established by the findings are briefly these: Haws, an employee of the defendant in error, while engaged in such employment in working the mines by it located and of which it was in the actual possession, conceived the secret intention of taking possession of the property of his employers for his own benefit. In execution of this illegal purpose he procured the assistance of Timothy in making a so-called location on the ground which was then occupied by his employer and upon which he (Haws) was working as its servant. That they set stakes and posted notices so as to cover the claims already discovered and which he knew were being worked at the time these stakes were placed and notices posted, and that shortly after this wrongful driving of stakes, Haws, in the night time, ousted the defendant in error from the possession which it enjoyed,

and the illegal dispossession thus accomplished was thereafter maintained by force. The elementary rule is that one must recover on the strength of his own and not on the weakness of the title of his adversary, but this principle is subject to the qualification that possession alone is adequate as against a mere intruder or trespasser without even color of title, and especially so against one who has taken possession by force and violence. This exception is based upon the most obvious conception of justice and good conscience. It proceeds upon the theory that a mere intruder and trespasser cannot make his wrong doing successful by asserting a flaw in the title of the one against whom the wrong has been by him committed."

Numerous cases are cited in support of the doctrine thus laid down by the court.

We have seen that the notices and the markings of Hackley and McConaghy were clearly unlawful if it is to be held that the notices and markings of Hall and Chisholm were unlawful. This being true, Hackley and McConaghy and their associates were trespassers and intruders as against the occupancy of these claims maintained and enjoined by the appellees. That occupancy the appellees had the right to continue to enjoy as against the acts of trespass committed by the appellants, and the application of the doctrine of *Haws* vs. *Victoria Copper Mining Company* entitled them to the relief which they sought by their bill of complaint and which the court below gave them by its decree.

Finally, we submit that there is no error in the record and that the judgment of the court below ought to be affirmed.

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No. 37.

Brief of Dudley & McKinley

Appeal

Filed Nov. 23, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

McKINLEY CREEK MINING COMPANY *et al.*, Appellants,
vs.
THE ALASKA UNITED MINING COMPANY *et al.*. } No. 37.

Appeal from the District Court of the United States for the District of Alaska.

SUPPLEMENTAL BRIEF FOR APPELLEES.

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GORHAM T. PLANTY PRINTING CO.

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Brief for Appellees Filed at the Request of the Court.

The Court has requested counsel to file briefs on the question as to what errors in respect of giving or refusing instructions, or other rulings, on a trial by jury in a case of this character, are open for consideration on appeal from the District Court of Alaska.

I.

This is a Suit in Equity.

This case was tried in the District Court of the United States for the District of Alaska pursuant to the Act of Congress approved May 17, 1884 (23 Stat., 24, 25, 26). That statute, so far as it relates to civil proceedings, was not abrogated until the Act of June 6, 1900, making further provision for the civil government for Alaska, took effect. (31 Stat., 321.) The judgment was rendered November 25, 1899. (Rec., 202.) Therefore it is clear that this case was adjudicated under the Act of March 17, 1884.

Section 7 of that act provides that "the general laws of the State of Oregon, now in force, are hereby declared to be the law in said District, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States."

We find the following provisions in section 7 of the Act of Congress approved May 17, 1884: "But the said district court shall have exclusive jurisdiction in all cases *in equity* or those involving a question of *title to land*, or *mining rights*, or to the constitutionality of a law, and in all criminal offences which are capital. In all civil cases, *at common law*, any issue of fact shall be determined by a jury, at the instance of either party." * * * (23 Stat., 25, 26.)

We submit that this statute preserves distinctly the differences between actions at law and suits in

equity which have prevailed from the beginning in our National legislation and jurisprudence.

If the laws of Oregon are to be considered in this connection, it seems to us that they must be held to fix the character of this litigation as a suit in equity.

The Constitution of Oregon was made in 1857 and it went into effect February 14, 1859, the date fixed by the Act of Congress admittting Oregon into the Union. (See note at the top of page 77, 1 Hill's Oregon Code.) Sec. 17, Art. 1, of that Constitution is as follows: "In all civil cases the right of trial by jury shall remain inviolate." The meaning of this section is, that the right of trial by jury shall continue to all suitors in the courts in all cases in which it was secured to them by the laws and procedure of the courts at the time of the adoption of the Constitution. (*Tribon* vs. *Strowbridge*, 7 Or., 156.)

Chapter 2 of the Oregon Code relates to issues, trials, and judgments in civil actions. (1 Hill's Or. Code, 282, 286, 293, 303.) This chapter does not relate to the trial of suits *in equity*, but such suits are covered by chapter 5 of the Code. (1 Hill's Or. Code, p. 404.) Sec. 380, p. 404, provides that "the enforcement or protection of a private right, or the prevention of or the redress for an injury thereto, shall be obtained by suit *in equity* in all cases where there is not a plain, adequate, and complete remedy at law; and may be obtained thereby in the cases where courts of equity have been used to exercise concurrent jurisdiction with

courts of law, unless otherwise specially provided in this chapter."

This is from the first section of chapter 5, and it clearly states the general principles of equity jurisdiction.

Section 504, 1 Hill's Oregon Code, 458, is the first section of Title VIII, chapter 5, relating to *suits in equity*, and it is that section on which this suit is predicated. It is as follows: "Any person in possession by himself or his tenant of real property may maintain a suit *in equity* against any other who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest." This language, as well as the location of the section in that part of the Code relating to suits in equity, puts the case at bar in the category of equitable proceedings, and makes it impossible to classify it as an action at law under the laws of Oregon.

These statutes and decisions show, as we think, that this is a suit in equity, when looked at from the Oregon standpoint.

And we submit, also, that this is a suit in equity, whether tested by the rules of State or of National procedure and jurisdiction.

II.

Power of this Court on Appeal.

The concluding sentence of the Act of May 17, 1884 (23 Stat., 25, 26), is as follows:

"And the final judgments or decrees of said circuit and district court may be reviewed by the Supreme Court of the United States as in other cases."

To what extent and in what manner does this Court "review" the "decree" of the court below "in other cases" on appeal?

1. THE JURY TRIAL.—If the case was triable only under the laws of Congress, it could not have been sent to a jury as of right. (Sec. 648, Rev. Stat.) If it were triable under the laws of Oregon, it could not have been sent to a jury as a matter of right, as we will show in this brief later. (See Hill's Or. Code, sec. 396.)

As was said in *Wilson* vs. *Riddle* (123 U. S., on p. 615); "The submission of the issues to the jury was for the information of the conscience of the chancellor. It is evident from the terms of the decree that the chancellor adopted the findings of the jury as being satisfactory to him upon the whole testimony in the case, for the decree states that the court makes its finding upon the proof submitted. Under said circumstances, it is not the practice of an appellate court to consider *formal exceptions to rulings in the course of the trial of the issues before the jury.* (*Brockett* vs. *Brockett*, 3 How., 691; *Johnson* vs. *Harmon*, 94 U. S., 371; *Watt* vs. *Starke*, 101 U. S., 247.")

In the case at bar, the Record shows that the decree was rendered on the pleadings, "and the said proofs, and by reason of the verdict of the jury

thereon, approved and adopted by this Court." * * * (Rec., p. 201.)

Thus it appears that the chancellor adopted the verdict of the jury, and that the rule above quoted should be applied to all "formal exceptions to rulings in course of the trial of the issues before the jury," and such formal exceptions should not be considered by this Court.

2. TERRITORIAL COURTS.—It is provided by section 702, Revised Statutes, that "the final judgment and decrees of the supreme court of any territory, * * * may be reviewed and reversed or affirmed in the Supreme Court, upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of the circuit court." * * *

If the courts of Alaska are to be compared with territorial courts, generally speaking, then it would seem that appeals from decrees rendered by the Alaska courts are to be treated by this Court exactly as are treated appeals from the decrees of territorial courts.

It is well settled that this Court cannot consider the weight or sufficiency of the evidence on appeal from a decree rendered by a territorial court (*Karrick* vs. *Hannaman*, 168 U. S., 328) and that alleged errors in the admission or rejection of evidence cannot be passed upon by this Court on appeal from a decree rendered by a territorial court, where it cannot be done without examining the weight of evidence and disregarding the facts found. (*Young* vs. *Amy*, 171 U. S., 179.)

If the whole evidence is recited in the statement of the case made by the territorial court, this Court can consider it only for the purpose of passing upon the exceptions taken to the admission or rejection of parts of it, and not for the purpose of deciding whether the whole evidence supports the findings of the lower court. (*Idaho & Or. Land Imp. Co.* vs. *Bradbury*, 132 U. S., 509.)

These rulings are predicated on section 2 of the Act of April 7, 1874, 18 Stat., 27, which provides "that on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below," etc.

In *San Pedro Co.* vs. *United States*, 146 U. S., 120, 130, this statute was held to limit this Court, on appeal from a decree rendered by a territorial court, to a determination whether the findings of fact made by the court below supported its decree, and whether there was any error in the rulings duly excepted to on the admission or rejection of evidence; and it was held that the authority of this Court in such cases does not extend to a consideration of the weight of evidence or its sufficiency to support the conclusions of the court. To the same effect are *Holoway* vs. *Dunham*, 170 U. S., 615; *Marshall* vs. *Burtis*, 172 U. S., 631; *Cohn* vs. *Daley*, 174 U. S., 539.

3. CIRCUIT COURTS.—Section 692, Revised Statutes, provides that "an appeal shall be allowed to

the Supreme Court from all final decrees of any circuit court, or of any district court acting as a circuit court, in cases of equity, * * * and the Supreme Court is required to receive, hear, and determine such appeals."

This Court has held that, under this section, the facts found by the court below are conclusive here, and that this Court will pass on such rulings only as might be presented by a *bill of exceptions prepared as in an action at law*. *The City of New York*, 147 U. S., 72, 76, 77, and numerous cases cited.

The case of *Parsons* vs. *Bedford*, 3 Peters, 433, we believe to be quite instructive in this connection. That case came to this Court on a writ of error and the district court of the United States for the Eastern District of Louisiana, and the suit was originally commenced by an attachment in the State court, but it was removed to the Federal court on the petition of the defendant, a citizen of Massachusetts. It was tried in the Federal court before a jury. A specific exception was taken on the trial to the competency of Fiske, a witness, to testify, and a bill of exceptions was filed for the purpose of preserving the case. Mr. Justice Story wrote the opinion of the Court, and, after discussing at some length the statute of Louisiana concerning trials by jury, considering the Seventh Amendment of the Federal Constitution, and showing that this amendment preserved the right of trial by jury in "all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights," he discussed the power of this Court to re-examine

the facts tried by a jury in any other manner. (See pages 479–481.)

In passing on this branch of the case, Mr. Justice Story said:

> "But the other clause of the amendment is still more important, and we read it as a substantial and independent clause. 'No fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the reward of a *venire facias de novo*, by the appellate court, for some error of law which intervened in the proceedings."

The foregoing language was quoted with approval in *Hepburn* vs. *Dubois*, 12 Peters, 345, 376, and the Court said:

> "If this Court can comprehend what these rules are, or promulgate them in intelligible language, they are these:
>
> "That where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law to establish such fact; a jury may infer any fact from such evidence, which the law authorizes a court to infer on a demurrer to the evidence; after a verdict in favor of either party, on the evidence, he has a right to demand of a court of error that they look to the evidence only, for only one purpose, and with the single eye to ascertain whether it

was competent in law to authorize the jury to find the facts which make out the right of the party, on a part, or the whole of the case. If, in its judgment, the appellate court shall hold that the evidence was competent, then they must found their judgment on all such facts as were legally inferable therefrom; in the same manner and with the same legal results, as if they had been found and definitely set out in a special verdict. So, on the other hand, the finding of the jury on the whole evidence in a cause, must be taken as negativing all facts, which the party against whom their verdict is given, has attempted to infer from, or establish by the evidence."

That case has been followed repeatedly by this Court. (*Miller* vs. *Life Ins. Co.*, 12 Wall., 285; *Hathaway* vs. *Bank*, 134 U. S., 494.)

4. STATE COURTS.—Section 709, Revised Statutes, provides that "a final judgment or decree in any suit in the highest court of a State, * * * may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error." * * * *

In *Egan* vs. *Hart*, 165 U. S., 188, it was held "that on error to a State court in a chancery case, as in a case at law, when the facts are found by the court below, this Court is concluded by such findings." And the Court held that it could not re-examine the evidence. See, also, *Dower* vs. *Richards*, 151 U. S., 658, where the cases are collected.

III.

No Error in the Record.

We think we have shown:

(*a*) That this Court is conclusively bound by the facts found by the court below, by the verdict, and the decree (Rec., 200–202) and will not review them.

(*b*) The weight or sufficiency of the evidence will not be considered by this Court.

(*c*) Formal exceptions to the rulings of the court below will not be considered here.

(*d*) Alleged errors in the admission or rejection of evidence will not be passed upon by this Court where it cannot be done without examining the weight of evidence and disregarding the facts found.

(*e*) If the whole evidence is recited in the statement of facts made by the court below, this Court can consider it only for the purpose of passing on the exceptions taken to the admission or rejection of parts of it.

(*f*) This Court may consider errors duly excepted to in the court below and preserved by a bill of exceptions, such as might be prepared in an action at law.

(*g*) The right of review is limited to questions of

law appearing on the face of the record and does not extend to matters of fact or discretion.

Certain questions now arise:

1. *How were the facts found and what are they?*

The Record shows that the defendants (appellants) asked for a jury and that one was empanneled and sworn. (Rec., 200, 201.) Doubtless this was done under section 396, 1 Hill's Oregon Code, which provides that "both issues of law and fact shall be tried by the court unless referred. Whenever it becomes necessary or proper to inquire of any fact by the verdict of a jury the court may direct a statement thereof and a jury be formed to inquire of the same. The statement shall be tried as an issue of fact in the action and the verdict may be read as evidence on the trial of the suit." (See *De Lashmutt* vs. *Everson*, 7 Or., 217; *Swegle* vs. *Wells*, 7 Or., 222; *De Lashmutt* vs. *Tillotson*, 7 Or., 212; *Learned* vs. *Tillotson*, 97 N. Y., 1.)

There is no other provision relating to the trial of questions of fact by juries in *equity cases.*

The Record shows that the jury heard the evidence, etc., and returned a verdict which found for the plaintiffs (appellees) as to the property in controversy. (Rec., 201.) "Which said verdict was by the court received and ordered recorded, and the findings therein contained upon the issues in said cause were by the court approved and adopted." (Rec., 201.) The verdict, and this adoption of it by the court, make an affirmative

finding by the court below in favor of the plaintiffs (appellees) on all the averments of the bill of complaint. (Rec., 143–145.) The decree not only adopts the verdict of the jury, but it also orders, adjudges, and decrees that the defendants (appellants) have no right, title, or interest whatever in or to the property, and the title thereto is in the plaintiffs (appellees). (Rec., 201.) The bill of complaint, the verdict, and the decree show that the court found for the plaintiffs on the facts and the law, and we submit that such finding is condusive on this Court.

2. *Have any of the Rulings of the Court Below been Preserved Duly by the Bill of Exceptions or Otherwise?*

Title VIII, chapter 2, 1 Hill's Oregon Code, 316, relates to new trials and the method of applying for them. Section 235, p. 316, specifies the causes for granting new trials. These causes are those which prevail in all of the Code States. Following this section are notes covering seven pages, and containing citations to the decisions in Oregon and other Code States applicable to the granting of new trials, general irregularities on the trial, insufficiency of evidence to justify the verdict or decision, errors of law excepted to, etc.

Error which is relied on must be shown clearly, affirmatively, and specifically. (See authorities cited in 1 Hill's Code, 324.) Of course, this can only be done by a bill of exceptions, such as is provided for by Title VII, 1 Hill's Code, 313–316

and notes. Section 231, page 314, directs that "the point of the exception shall be particularly stated, and may be delivered in writing to the judge, or entered in his minutes, and at the time or afterwards be corrected until made conformable to the truth." Section 232, p. 315, provides that "no particular form of exception shall be required. The objection shall be stated with so much of the evidence or other matter as is necessary to explain it, but no more." The authorities are collected in a note to that section, and they hold that, to make an exception effectual in a bill of exceptions, the objection should be stated and also the ground upon which it was made. They also hold that insufficiency of the evidence must be specifically stated. Section 233 provides that the bill shall be signed by the judge and filed with the clerk, and thereafter it shall be deemed and taken to be a part of the record in the case.

On pages 3–6 of our original brief, we gave the reasons why we thought there was no bill of exceptions in the Record. We are still of the same opinion. If there is a valid bill of exceptions in the Record, we think it is the alleged bill copied in the transcript on pages 166–207, beginning with the words, "Bill of Exceptions," allowed and signed February 6, 1900, but without anything appearing on it to show that it was filed as required by section 233 of the Oregon Code. If this alleged bill of exceptions is to be treated as valid, there are in it the following vital defects, as we think:

1. The evidence is not in the bill; nor is it in the Record, for it was *not filed.*

2. The instructions given are not in the bill; nor are they in the Record, for they were not filed or incorporated in the alleged assignment of errors, or brought into the Record in any manner.

3. The exceptions to the instructions given and refused are not in the bill or in the Record.

4. The assignment of errors was not signed or filed, and so is not properly in the bill or in the Record.

If these objections are well taken, the judgment of the court below will have to be affirmed, for all the questions discussed in the brief for the appellants are based on the evidence and on the instructions given and refused by the court below.

On page 198 of the Record, there is printed a "Motion for New Trial." The first ground of the motion is based on the evidence taken, offered, and admitted, and the rulings made and excepted to. It will be observed that the statement is broad and does not point out any of the supposed defects or errors.

The second ground is, "Insufficiency of the evidence to justify the verdict of the jury in said case, and that said verdict is against law." The reasons or grounds of insufficiency are not stated.

The third ground is, "Errors in law occurring at the trial and excepted to by the defendants, and

exceptions to the instructions given by the court to the jury, and exceptions to the refusal of the court or judge thereof to give certain instructions offered by the defendants and numbered 'III, IV, V, VII, VIII, IX.'"

This ground does not specify errors in law occurring at the trial and excepted to by the defendant, nor does it specify the exceptions to the instructions given by the court to the jury, nor does it set forth the exceptions to the refusal of the court to give the instructions offered by the defendants and numbered as above set forth.

It is well settled that exceptions and errors must be duly and particularly assigned and that general or specific statements will not suffice. The motion for new trial deals in glittering generalities only. There is nothing in it to point out to the court the nature of the alleged errors committed, nor the character of the objections and exceptions taken. We submit that this motion is not within the provisions of the Oregon Code heretofore cited, and that the overruling of the motion by the court was not erroneous.

There is printed in the transcript a paper which is entitled "Assignment of Errors," which begins on page 167 and ought to end somewhere, but we have not been able to find its termination clearly defined. At any rate, we are not able to find the signature of counsel or a filing mark thereon. The first assignment is at the bottom of page 167, and the last formal assignment that we are able to find is the second paragraph from the bottom of page

197, just above the figures "31." In our judgment, the matter printed on pages 166–197, inclusive, is not in the Record and should not be considered by this Court.

These objections cover the alleged objections to evidence and the exceptions concerning the giving and refusal of instructions to the jury.

We find nothing in the Oregon Code which requires the presenting or filing of assignments of error, and therefore we assume that counsel for the appellants understood that such assignments were required by the Federal practice. If this assumption be well founded, it is certain that an assignment of errors cannot become a part of the Record unless signed by counsel and filed in the cause, all of which must affirmatively appear upon the Record; otherwise such printed assignment is not a part of the Record, and cannot be considered by this Court.

For these reasons we repectfully submit that there is no error in the Record, and that the decree of the court below should be affirmed.

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